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No. 96-567

In the Supreme Court of the United States

OCTOBER TERM, 1996

COMMONWEALTH OF VIRGINIA, PETITIONER

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency's disapproval of Virginia's Title V operating permit program was contrary to law, where the Clean Air Act requires that an approvable state permit program provide "an opportunity for judicial review in State court of the final [state] permit action by * * * any person who participated in the [state] public comment process," 42 U.S.C. 7661a(b)(6), but Virginia's permit program provides for judicial review only on a much more restricted basis.

2. Whether Clean Air Act incentive provisions that encourage state participation in Clean Air Act programs, by (a) conditioning the availability of certain federal highway funds and (b) requiring additional pollution reductions before certain major new stationary sources of air pollution may be constructed, if Virginia does not adopt a minimally acceptable Title V permit program, violate the Tenth Amendment and related constitutional principles of federalism.

3. Whether Clean Air Act incentive provisions that condition the availability of certain federal highway funds to Virginia on the State's adoption of a minimally acceptable Title V permit program violate the Spending Clause of the United States Constitution.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	14
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Brown v. *EPA*, 521 F.2d 827 (9th Cir. 1975), vacated and remanded for consideration of mootness, 431 U.S. 99 (1977)	21
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	11
Citizens for Clean Air v. *Commonwealth*, 412 S.E.2d 715 (Va. Ct. App. 1991)	10
City of Columbia v. *Costle*, 710 F.2d 1009 (4th Cir. 1983)	23
Delaware Valley Citizens' Council for Clean Air v. *Pennsylvania*, 678 F.2d 470 (3d Cir.), cert. denied, 459 U.S. 969 (1982)	24
District of Columbia v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), vacated and remanded for consideration of mootness *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977)	4, 21
Environmental Defense Fund v. *Virginia State Water Control Bd.*, 404 S.E.2d 728 (Va. Ct. App. 1991)	10
Environmental Defense Fund, Inc. v. *EPA*, 82 F.3d 451, amended, 92 F.3d 1209 (D.C. Cir. 1996)	26
FERC v. *Mississippi*, 456 U.S. 742 (1982)	19, 27
Fries v. *State Water Control Bd.*, 409 S.E.2d 634 (Va. Ct. App. 1991)	10
Fullilove v. *Klutznick*, 448 U.S. 448 (1980)	22, 25
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)	11, 14, 18

Cases—Continued: Page

Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) 18, 27
Ivanhoe Irrigation Dist. v. *McCracken*, 357 U.S. 275 (1958) 25
Lau v. *Nichols*, 414 U.S. 563 (1974) 22, 25
Maryland v. *EPA*, 530 F.2d 215 (4th Cir. 1975), vacated and remanded for consideration of mootness *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977) 21
Massachusetts v. *United States*, 435 U.S. 444 (1978) 22
Middlesex County Utilties Auth. v. *Borough of Sayreville*, 690 F.2d 358 (3d Cir. 1982) 23
Missouri v. *United States*, 918 F. Supp. 1320 (E.D. Mo. 1996), appeal pending, No. 96-2244 (8th Cir.) ... 14, 24
Natural Resources Defense Council, Inc. v. *EPA*, 902 F.2d 962 (1990), vacated in part, 921 F.2d 326 (D.C. Cir. 1991), cert. dismissed, 498 U.S. 1075, cert. denied, 498 U.S. 1082 (1991) 26
Nebraska v. *Tiemann*, 510 F.2d 446 (8th Cir. 1975) 24
Nevada v. *Skinner*, 884 F.2d 445 (9th Cir. 1989), cert. denied, 493 U.S. 1070 (1990) 23
New Mexico Envtl. Improvement Div. v. *Thomas*, 789 F.2d 825 (10th Cir. 1986) 4
New York v. *United States*, 505 U.S. 144 (1992) .. *passim*
Oklahoma v. *Schweiker*, 655 F.2d 401 (D.C. Cir. 1981) 24, 25
Oklahoma v. *United States Civil Service Comm'n*, 330 U.S. 127 (1947) 22, 25
Pennsylvania v. *EPA*, 500 F.2d 246 (3d Cir. 1974) 24
Plan for Arcadia, Inc. v. *Anita Assocs.*, 379 F. Supp. 311 (C.D. Cal. 1973), aff'd, 501 F.2d 390 (9th Cir.), cert. denied, 419 U.S. 1034 (1974) 21

Cases—Continued: Page

Sierra Club v. *Indiana-Kentucky Elec. Corp.*, 716 F.2d 1145 (7th Cir. 1983) 21
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 11
South Dakota v. *Dole*, 483 U.S. 203 (1987) 12, 22, 23, 25, 27
Steward Machine Co. v. *Davis*, 301 U.S. 548 (1937) 12, 22, 23
United States v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) . 11
Walker Field, Colorado, Pub. Airport Auth. v. *Adams*, 606 F.2d 290 (10th Cir. 1979) 24

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 8:
Cl. 1 (Spending Clause) 11, 12, 25
Cl. 3 (Commerce Clause) 18, 19, 27
Art. III 7, 10, 17
Amend. X 11, 13, 14, 18, 26, 28
Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 14
Civil Rights Act of 1964, 42 U.S.C. 2000 *et seq.* 25
Clean Air Act, 42 U.S.C. 7401 *et seq.* 2
Tit. I, 42 U.S.C. 7401-7515:
42 U.S.C. 7407 2
42 U.S.C. 7409 (§ 109) 2
42 U.S.C. 7410 (§ 110) 2
42 U.S.C. 7410(a)(2)(A)-(M) 2
42 U.S.C. 7410(c) 2
42 U.S.C. 7413 (§ 113) 12, 21
42 U.S.C. 7413(a)(2) (§ 113(a)(2)) 21
42 U.S.C. 7413(a)(3) (§ 113(a)(3)) 21
42 U.S.C. 7413(b) (§ 113(b)) 21
42 U.S.C. 7502 (§ 172) 3
42 U.S.C. 7503 (1988) 4
42 U.S.C. 7503 (§ 173) 6
42 U.S.C. 7506 (1988) 4
42 U.S.C. 7506(c) 25, 26

Statutes and regulations—Continued: Page

42 U.S.C. 7509(a) 5
42 U.S.C. 7509(b) (§ 179(b)) 5, 18
42 U.S.C. 7509(b)(1) 5
42 U.S.C. 7509(b)(2) 5
42 U.S.C. 7511a 2
42 U.S.C. 7511a(a)-(e) 3
42 U.S.C. 7511a(b)(5) 6
42 U.S.C. 7511a(c)(10) 6
Tit. III, 42 U.S.C. 7601-7627:
42 U.S.C. 7607(b)(1) 5
Tit. V, 42 U.S.C. 7661-7661f 3
42 U.S.C. 7661a(a) 3
42 U.S.C. 7661a(b) (§ 502(b)) 3
42 U.S.C. 7661a(b)(6) (§ 502(b)(6)) ..... *passim*
42 U.S.C. 7661a(d) (§ 502(d)) 18
42 U.S.C. 7661a(d)(1) 3
42 U.S.C. 7661a(d)(2)(B) 4, 5
42 U.S.C. 7661a(d)(2)(C) 6
42 U.S.C. 7661a(d)(3) 6
42 U.S.C. 7661a(i) (§ 502(i)) 18
42 U.S.C. 7661a(i)(2) 4, 5
42 U.S.C. 7661a(i)(3) 6
42 U.S.C. 7661a(i)(4) 6
42 U.S.C. 7661a(b)(5)(F) 6
42 U.S.C. 7661d(b)(3) 6
Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. 2021c(a)(1)(A) 20
Va. Code Ann.:
§ 10.1-1318 (Michie 1993) 7, 9
§ 10.1-1318 note (Michie 1996) 8
§ 10.1-1318(B) (Michie 1993) 7
1996 Va. Acts Ch. 1032, Cl. 3 8
40 C.F.R.:
Section 70.3(a) 7
Section 70.3(b) 7
Section 70.4(b)(3) 7
Section 70.4(b)(3)(x) 8
Section 70.8(e) 6

Miscellaneous: Page

136 Cong. Rec. (daily ed. Oct. 27, 1990):
p. S16,941 15
p. S16,983 3
59 Fed. Reg. (1994):
p. 31,185 7
p. 62,324 6
pp. 62,324-62,326 7
H.R. Conf. Rep. No. 952, 101st Cong., 2d Sess. (1990) 3
H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977) 4
H.R. Rep. No. 490, 101st Cong., 2d Sess. (1990) 26

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 80 F.3d 869.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1996. A petition for rehearing was denied on July 12, 1996. Pet. App. 33-34. The petition for a writ of certiorari was filed on October 10, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, enacted in 1970 and extensively amended in 1977 and 1990, establishes a joint state and federal program to control the Nation's air pollution. Section 109 of the CAA, 42 U.S.C. 7409, requires the Environmental Protection Agency (EPA) to establish primary and secondary national ambient air quality standards (NAAQS) for certain pollutants, such as carbon monoxide, nitrogen dioxide, and ozone, that are necessary to protect public health and welfare. Section 110, first enacted in 1970, contemplates that States will apply the measures necessary to attain the NAAQS to individual sources of air pollution through a State Implementation Plan (SIP) prepared by each State, subject to EPA review and approval. 42 U.S.C. 7410. A SIP must specify emission limitations and other measures necessary to attain and maintain the NAAQS for each pollutant for each "air quality control region" within the State. 42 U.S.C. 7410(a)(2)(A)-(M). If a State fails to submit a SIP, or if EPA disapproves a SIP, and that failure is not remedied within the time period set by the Act, then EPA must promulgate and implement a federal implementation plan (FIP) for the air quality control region in lieu of the state plan. 42 U.S.C. 7410(c). Beginning with the CAA Amendments of 1977, air quality control regions were designated as either "attainment" or "nonattainment" areas, depending upon whether they met the NAAQS for a particular pollutant. 42 U.S.C. 7407.[1]

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[1] The 1990 CAA Amendments classified nonattainment area according to the severity of air pollution. Ozone nonattainment areas were classified as marginal, moderate, serious, severe, and extreme. 42 U.S.C. 7511a. For each type of pollutant and area classification, the Act specifies a number of different programs for States to adopt in their SIPs to achieve attainment with the NAAQS. See generally

As part of the 1990 CAA Amendments, Congress added a new Title V, establishing an operating permit program. 42 U.S.C. 7661-7661f. In order to improve stationary source compliance with the CAA requirements, Title V requires that all applicable requirements for certain stationary sources of air pollution, including those contained in an approved SIP, be included in a single comprehensive permit document for each source. See, *e.g.*, 136 Cong. Rec. S16,983 (daily ed. Oct. 27, 1990); H.R. Conf. Rep. No. 952, 101st Cong., 2d Sess. 345 (1990). Sources subject to the Title V program are prohibited from operating without, or in violation of, an operating permit containing all of the applicable CAA requirements. 42 U.S.C. 7661a(a).

Title V contemplates that States will develop, under their own state statutes and/or local laws or regulations, operating permit programs to be implemented within their borders, and submit those programs to EPA for approval. 42 U.S.C. 7661a(d)(1). Generally, EPA reviews a submitted state Title V permit program, and after notice and comment rulemaking procedures, EPA either approves or disapproves the program. *Ibid.* Section 502(b) of the CAA requires that approvable state permit programs include certain "minimum elements," which EPA is charged to codify and further refine by regulation. That provision requires that

> [t]hese elements shall include each of the following: * * * (6) Adequate, streamlined, and reasonable procedures * * * for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, * * * *including an opportunity for judicial review in State court of*

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42 U.S.C. 7502, 7511a(a)-(e). Virginia has four areas that are out of attainment with the ozone NAAQS and one area out of attainment with the carbon monoxide NAAQS.

> *the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.*

42 U.S.C. 7661a(b)(6) (emphasis added).

2. Influenced in part by a suggestion in *District of Columbia* v. *Train*, 521 F.2d 971, 992-993 (D.C. Cir. 1975), vacated and remanded for consideration of mootness *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977) (per curiam), Congress first adopted incentives in 1977 to encourage state participation in CAA programs.[2] In the 1990 CAA Amendments, Congress built upon the Act's existing system of incentives to encourage state participation in the CAA's joint regulatory scheme. The Act now provides for so-called "sanctions" that apply if States fail to adopt within the statutory time frame various CAA programs, including the Title V Operating Permit Program, that meet minimum federal standards.

The mandatory sanction provisions operate by an 18-month sanction "clock," which is triggered if a State fails to submit a Title V permit program by the required date, 42 U.S.C. 7661a(d)(2)(B), if a program submittal is disapproved by EPA, *ibid.*, or if the State fails to administer and enforce an approved program adequately, 42 U.S.C. 7661a(i)(2). If the 18-month "clock" expires without the deficiency having been remedied, one of two sanctions

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[2] See H.R. Rep. No. 294, 95th Cong., 1st Sess. 290 (1977) (citing *Train*). Specifically, Congress conditioned the availability of certain federal highway funds and placed certain limitations on the ability to construct or modify certain air pollution sources upon whether a State chooses to adopt or implement certain substantive provisions of the Act, including state adoption of SIPs that conform with certain minimum federal requirements. See 42 U.S.C. 7503, 7506 (1988). See also, *e.g.*, *New Mexico Envtl. Improvement Div.* v. *Thomas*, 789 F.2d 825 (10th Cir. 1986).

must be applied. 42 U.S.C. 7661a(d)(2)(B) (incorporating sanctions provided for in 42 U.S.C. 7509(b)), 7661a(i)(2) (same). A second sanction must be imposed six months after the first sanction if the deficiency still has not been corrected. See 42 U.S.C. 7509(a).[3]

The two sanctions available under Title V are set forth in Section 179(b) of the CAA, 42 U.S.C. 7509(b). First, the EPA Administrator may direct the Secretary of Transportation not to approve certain projects or to provide certain federal highway funds under Title 23. 42 U.S.C. 7509(b)(1). That highway funding sanction applies only to projects in nonattainment areas in the State. *Ibid.* In addition, the highway funds sanction is subject to a number of exemptions for specific types of projects, such as those that promote safety, capital grants for public transit, certain types of programs that improve traffic flow and achieve a net reduction in emissions of air pollutants, and programs that the EPA Administrator and the Secretary of Transportation determine would improve air quality and would not encourage single occupancy vehicle capacity. *Ibid.* Thus, even where the highway funds sanction is imposed under Title V, a State may obtain all available federal highway funds by submitting projects that fall within one or more of the exemptions or that would be undertaken solely within attainment areas of the State.

The second available sanction is the "offset" sanction. 42 U.S.C. 7509(b)(2). When that sanction applies, a major

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[3] Before any sanction may be imposed under Title V, EPA must select which of the two available sanctions would apply first. That determination would be made pursuant to notice and comment rulemaking procedures, and the Agency's determination would be reviewable in the courts of appeals. 42 U.S.C. 7607(b)(1). To date, EPA has not taken such regulatory action with respect to Title V, and thus the sanctions under Title V have not been applied to Virginia or to any other State.

new or modified stationary source of air pollution subject to the nonattainment new source review program under Section 173 must show, in order to obtain a permit to construct or modify the source, that certain emissions from other sources will be reduced by at least twice as much as the amount of the increased emissions from the new or modified source. That 2:1 ratio is an increase from the 1.15:1 ratio that would otherwise apply in a moderate ozone nonattainment area (see 42 U.S.C. 7511a(b)(5)) and the 1.2:1 ratio that would otherwise apply in a serious ozone nonattainment area (see 42 U.S.C. 7511a(c)(10)).[4]

Finally, if a State's Title V program has not been approved within two years from the date by which the State should have submitted it, EPA must promulgate, administer, and enforce a federal Title V program for the State. 42 U.S.C. 7661a(d)(3) and (i)(4).

3. EPA's final disapproval of Virginia's Title V permit program, 59 Fed. Reg. 62,324 (1994) (C.A. App. 85), was based upon the failure of that program to satisfy five requirements. Of particular relevance here, EPA concluded that the Virginia scheme did not provide adequate opportunity for judicial review at the behest of "any person who participated in the public comment process" under Section 502(b)(6), 42 U.S.C. 7661a(b)(6).[5] Although

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[4] In applying the offset sanction under Title V, the increased emission reductions ratio applies only to designated nonattainment areas, and then only to the pollutants for which the area has been designated nonattainment. Thus, new or modified major stationary sources located in attainment areas, or sources in nonattainment areas that only emit other pollutants, would not be affected. See 42 U.S.C. 7661a(d)(2)(C) and (i)(3).

[5] The other four deficiencies noted by EPA were: First, Virginia's program failed to prevent the default issuance of permits, as required by 42 U.S.C. 7661d(b)(3); see 42 U.S.C. 7661a(b)(5)(F) and 40 C.F.R. 70.8(e). Second, Virginia's submitted regulations necessary to imple-

that provision could be read to require States to dispense with standing requirements altogether for participants in the public comment process seeking to obtain judicial review, EPA adopted an interpretation more favorable to petitioner. It interpreted Section 502(b)(6) to require that, for a state permit program to be approvable, the program must at a minimum extend judicial review rights to those who could obtain judicial review if EPA administered the program—namely, participants in the state public comment process who would satisfy the standard for standing in federal court under Article III of the United States Constitution. Nonetheless, EPA concluded that Virginia's scheme remained inadequate because it offers judicial review of final permit decisions to public commenters only if they demonstrate an "immediate, * * * pecuniary and substantial interest," Va. Code Ann. § 10.1-1318(B) (Michie 1993).[6] See 59 Fed. Reg. 62,325-62,326 (1994) (C.A. App. 86-87).

4. a. Petitioner filed a petition for review in the court of appeals, challenging EPA's final disapproval of petitioner's

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ment the permit program failed to meet the requirements of 40 C.F.R. 70.4(b)(3) because the state regulations were due to expire on June 28, 1994, and had not been renewed. Third, Virginia's program exempted from the permit requirement certain sources that are required to be covered by the Title V regulations. See 40 C.F.R. 70.3(a) and (b). Fourth, Virginia's permit program failed to assure that permits would contain all applicable CAA requirements and incorrectly delineated the terms of permits that are enforceable only by Virginia. 59 Fed. Reg. 31,185 (1994) (C.A. App. 83).

[6] Virginia's Title V permit program judicial review provision, Va. Code Ann. § 10.1-1318 (Michie 1993), is reproduced at Pet. App. 77. The portions relevant here limit judicial review to persons "who participated * * * in the public comment process," if such persons have "suffered an actual, threatened or imminent injury" where "such injury is an invasion of an immediate, legally protected, pecuniary and substantial interest which is concrete and particularized."

Title V permit program. Petitioner did not contest or challenge the merits of four of the five independent deficiency findings upon which EPA based its disapproval of petitioner's Title V permit program. See note 5, *supra*. Accordingly, the court of appeals properly concluded that it could affirm EPA's disapproval on the basis of those four findings alone, provided that the statute is constitutional. Pet. App. 11.

b. Petitioner argued that the remaining, fifth basis for EPA's disapproval, regarding the limited judicial review rights petitioner established for its permit program, was contrary to Section 502(b)(6). Petitioner asserted that its permit program judicial review provision satisfies Section 502(b)(6).[7]

Section 502(b)(6) establishes three categories of persons who must be entitled to judicial review in state court, if a state permit program is to be approvable: "[1] the applicant, [2] any person who participated in the public comment process, and [3] any other person who could obtain judicial review of that action under applicable law." The parties agreed that the phrase "applicable law" in Section 502(b)(6) refers to state law. See 40 C.F.R. 70.4(b)(3)(x). Petitioner argued that the statute should be read to require judicial review at the behest of individuals in the second category—participants in the public comment process—only if they could show that they "could obtain

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[7] Since the court of appeals' decision, Virginia has conditionally amended the judicial review provision in order to correct the deficiency. Virginia's new provision, however, will not become effective "unless and until a final and unappealable decision of a court of competent jurisdiction has declared that [Virginia's permit program judicial review provision] as it is currently effective does not meet the requirements for state program approval under Title V." 1996 Va. Acts Ch. 1032, Cl. 3 (see Va. Code Ann. § 10.1-1318 note (Michie Supp. 1996)).

judicial review * * * under applicable [*i.e.*, state] law" pursuant to the third category. Petitioner thus argued that its judicial review provision for its air permit program, Va. Code Ann. § 10.1-1318 (Michie 1993)—and presumably each of the other potentially differing and narrower judicial review provisions in each of the other States—must be approved by EPA, no matter how they restrict standing of public comment participants to obtain judicial review.

c. The court of appeals rejected petitioner's argument as an impermissible reading of the statute, contrary to the plain meaning of Section 502(b)(6). Pet. App. 15-16. Applying the "last antecedent" rule, the court of appeals concluded that the phrase "under applicable [state] law" contained in the third category of Section 502(b)(6) modifies only that category of persons ("any other person who could obtain judicial review of that action under applicable law"), not the second category ("any person who participated in the public comment process"). The court further reasoned that petitioner's interpretation would render "mere surplusage" the plain language of Section 502(b)(6), since "then there would have been no need for Congress to have included the first two categories. The statute could have been written simply to say that standing should be given to 'any person' who complied with state standing rules." Pet. App. 16. Therefore, the court interpreted the first two categories in Section 502(b)(6) to establish a minimum, nationwide level of judicial review that all federally approvable state Title V permit programs must satisfy. The court concluded that the third category serves as a catch-all provision, allowing States to "grant broader standing rights than those otherwise required under federal law" and "ensur[ing] that the CAA does not inadvertently diminish standing rights previously granted under state laws." Pet. App. 16.

The court of appeals further stated that EPA's interpretation of the rights of public comment participants to obtain judicial review under Section 502(b)(6) is "both authorized by Congress and reasonable." Pet. App. 21. Specifically, the court approved EPA's determination that a state program can be approved even if it does not grant standing to *all* participants in the public comment process, so long as the State "grants standing * * * to those participants * * * who would have Article III standing to sue in federal court." *Id.* at 17. The court stated that EPA's interpretation harmonized the three categories of the judicial review provision in Section 502(b)(6) "with the portion that requires states to provide '[a]dequate, streamlined, and reasonable procedures.'" Pet. App. 18 (quoting Section 502(b)(6)). The court also noted that the EPA interpretation is practical to apply, Pet. App. 18, best preserves the uniform and minimum judicial review rights Congress intended to preserve in Section 502(b)(6), and best satisfies the policy goals of that provision, Pet. App. 22-23. The court of appeals further held that petitioner's permit program judicial review provision is more restrictive than that minimum standard.[8]

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[8] The court of appeals reviewed state case law establishing that Virginia courts apply a "pecuniary interest" test—the same test embodied in Virginia's Title V statute—and other restrictive rules to defeat judicial review rights of persons who would have met Article III's standing requirement. Among those denied judicial review rights were participants in the public comment process who were located downwind from permitted air pollution sources and downstream from permitted water pollution sources. Pet. App. 21-22 (discussing *Fries* v. *State Water Control Bd.*, 409 S.E.2d 634, 637 (Va. Ct. App. 1991) (holding that "an anticipated public injury" was not "an immediate, pecuniary, and substantial interest"); *Citizens for Clean Air* v. *Commonwealth*, 412 S.E.2d 715, 719-721 (Va. Ct. App. 1991); *Environmental Defense Fund* v. *Virginia State Water Control Bd.*, 404 S.E.2d 728, 731-732 (Va. Ct. App. 1991)). The court of appeals noted that a "plain-

d. The court of appeals also rejected petitioner's argument that the "plain statement" rule enunciated in *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991), should apply to preclude deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), to EPA's interpretation of Section 502(b)(6). The court did not decide whether state judicial standing rules fall within the core of state sovereignty identified in *Gregory*, federal intrusion upon which triggers the plain statement rule. Pet. App. 20, 24-25. Instead, the court held that, even if the fundamental state sovereignty concerns in *Gregory* were invoked, "[t]hat principle has no relevance in this case because here it is manifestly clear that Congress specifically intended that the states conform their judicial standing rules to meet the § 502(b)(6) standard." *Id.* at 19. Moreover, the court distinguished *Gregory* because "the CAA does not compel the states to modify their standing rules, it merely induces them to do so." *Id.* at 25. The statute at issue in *Gregory*, by contrast, would have directly applied certain qualifications for state law judges, absent application of the plain statement rule.

5. The court of appeals rejected petitioner's arguments that the "sanction" provisions (the highway funds and offset sanctions) violate the Tenth Amendment, the Spending Clause, and related constitutional principles of federalism.

a. The court of appeals rejected petitioner's contention that the CAA violates the Tenth Amendment by ordering the state legislature to adopt an approvable Title V per-

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tiff need not show 'pecuniary' harm to have Article III standing; injury to health or to aesthetic, environmental, or recreational interests will suffice." Pet. App. 21 (citing *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-687 (1973), and *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972)).

mit program through direct compulsion. The court held that, although the CAA's "sanctions provisions potentially burden the states, those sanctions amount to inducement rather than 'outright coercion.'" Pet. App. 25 (quoting *New York* v. *United States*, 505 U.S. 144, 166 (1992)). See also Pet. App. 30-31. The court also held that Section 113 of the CAA, 42 U.S.C. 7413, which sets out EPA's enforcement authority under the CAA, "may not be used to force Virginia to promulgate any state permit program, and EPA has not proposed invoking § 113 in this case." Pet. App. 25 n.6.

b. As an alternative to its express mandate argument, petitioner asserted in the court of appeals that the additional limitations imposed on highway funding under the CAA highway funds sanction provision exceed Congress's constitutional authority under the Spending Clause. Petitioner argued that the impact on the Commonwealth if the highway funds sanction were applied would be so severe that, under *South Dakota* v. *Dole*, 483 U.S. 203 (1987), the incentive would "pass the point at which 'pressure turns into compulsion,'" *id.* at 211 (quoting *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). Petitioner also argued that the relationship between the condition imposed on the use of federal highway funds (submittal of an approvable Title V permit program) and the purpose of federal highway funding is constitutionally inadequate under the Spending Power.

Rejecting petitioner's first argument, the court of appeals noted that "[n]o court * * * has ever struck down a federal statute on grounds that it exceeded the Spending Power." Pet. App. 27. The court of appeals also concluded that any financial impacts on Virginia's economy would not be so severe that, under *Dole*, they would rise to the level of "outright coercion." *Ibid.* The court of appeals correctly noted that federal funding would not be

limited in certain areas of Virginia, that federal funding would remain available in all areas for certain safety-related and pollution-reducing projects, and that petitioner could shift federal highway funds around in order to take advantage of those provisions. *Ibid.*

The court of appeals also rejected petitioner's argument that there is an inadequate relationship between the highway funds sanction and petitioner's failure to submit an approvable Title V permit program. The court explained that Title V of the CAA directly addresses air pollution from stationary sources, while the highway funds sanction pertains to many of the same pollutants from mobile sources. It concluded that "[t]he CAA as a whole is a comprehensive scheme to cope with the problem of air pollution from all sources. Congress may ensure that funds it allocates are not used to exacerbate the overall problem of air pollution." Pet. App. 28.

c. The court of appeals also rejected petitioner's arguments that the offset sanction violates the Tenth Amendment and related principles of federalism. The court concluded that the sanction does not directly compel the States to enact and enforce a federal regulatory program, in violation of *New York*, 505 U.S. at 161, 188. The court rejected petitioner's argument that the alleged impacts of this sanction are germane to the constitutional issues raised, holding that as allowed under *New York* the offsets involve direct regulation of private parties under the Commerce Clause and do not affect the "State as a sovereign," *id.* at 174. The court concluded that "[t]he burden of the offset sanction falls on private parties. * * * [I]t does not burden Virginia as a *governmental* unit. For this reason, the sanction does not violate the principles of federalism embodied in the Tenth Amendment." Pet. App. 28.

ARGUMENT

The court of appeals correctly held that Congress intended that state permit programs not be federally approved unless they conform to the nationwide standards for judicial review that Congress established in Section 502(b)(6) of the Clean Air Act (CAA), 42 U.S.C. 7661a(b)(6). The court of appeals also correctly held that Congress's determination to use its Spending and Commerce Powers to induce the States to establish Title V permit programs does not violate the Tenth Amendment. Neither ruling conflicts with any decision of this Court or any other court of appeals, and neither ruling warrants further review.[9]

1. In *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), this Court held that Congress must provide a "plain statement" of its intent if it wishes directly to constrain fundamental state decisions in a core area of state sovereignty.[10] Petitioner's contention (Pet. 10-16) that the court of appeals improperly applied that rule while interpreting Section 502(b)(6) lacks merit.

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[9] The constitutionality of the CAA sanction provisions has been raised in at least two other cases pending in the courts of appeals. See *Missouri* v. *United States*, 918 F. Supp. 1320 (E.D. Mo. 1996), appeal pending, No. 96-2244 (8th Cir.); *Commonwealth of Virginia* v. *EPA*, Nos. 95-1150, 95-1163 & 95-1177 (D.C. Cir.). If and when a court of appeals decision in those cases or in some other case creates a conflict in the circuits, review by this Court could be sought to resolve it.

[10] The specific question in *Gregory* was whether a statutory exception to the mandatory retirement provision of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, applied to state judges, even though the statute contained no express reference to state courts or judges. Given the obvious ambiguity in the statute, this Court applied the plain statement rule in *Gregory* to avoid a potentially difficult constitutional question under the Tenth Amendment and related principles of federalism. See 501 U.S. at 464.

a. This case provides no occasion for further delineation of the types of "fundamental" state decisions or circumstances in which the "plain statement" rule in *Gregory* should apply. That is because Section 502(b)(6) already contains an entirely plain statement that restrictive standing requirements such as those embodied in petitioner's proposed scheme are insufficient to satisfy the federal statutory standard.

As noted above, Section 502(b)(6) provides for judicial review at the behest of three classes of individuals: "[1] the applicant, [2] any person who participated in the public comment process, and [3] any other person who could obtain judicial review of that action under applicable law." Under the plain language of that provision, all permit applicants and those who "participated in the public comment process" are entitled to judicial review; other individuals (*i.e.*, nonparticipants) are entitled to judicial review only if they can show that they "could obtain judicial review * * * under applicable [*i.e.*, state] law." Although the statute thus permits States to require *non*-participants to show that they satisfy state law standing requirements, the statute is unequivocal that States may not use state law standing restrictions applicable to non-participants to eliminate the opportunity for participants to obtain judicial review.[11] It is difficult to imagine how

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[11] Petitioner asserts (Pet. 14) that Section 502(b)(6) "is undisputedly ambiguous * * * regarding Congress' intent to force states to adopt a different judicial review standard [from that ordinarily applicable under state law]." The text of the statute, however, makes clear that that was precisely Congress's intent. Moreover, as the court of appeals recognized, that intent is also clear from the legislative history of the statute, see Pet. App. 16 (quoting 136 Cong. Rec. S16,941 (daily ed. Oct. 27, 1990)), and from the application of the "last antecedent" rule of statutory construction, see Pet. App. 15. In addition, petitioner's theory of the meaning of Section 502(b)(6) does not give independent meaning

Congress could have stated that intent more plainly. As the court of appeals stated, "[t]h[e] principle [of *Gregory*] has no relevance in this case because here it is manifestly clear that Congress specifically intended that the states conform their judicial standing rules to meet the § 502(b)(6) standard." Pet. App. 19.

Petitioner does not dispute before this Court that petitioner's permit program judicial review provision fails to satisfy the plain language of Section 502(b)(6). Nor does petitioner offer any other interpretation of the language of Section 502(b)(6) under which petitioner's restrictions on judicial standing for those who participated in the public comment process could possibly be found to satisfy Section 502(b)(6). Instead, petitioner notes (Pet. 12) that EPA has interpreted the second prong of Section 502(b)(6) to broaden slightly the scope of permissible state standing requirements for participants in the public comment process. Petitioner then argues (Pet. 13) that *Gregory* has some relevance to this case because the EPA's "interpre-

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to each of the statute's terms. See Pet. App. 16. Under petitioner's theory, a state permit program would satisfy Section 502(b)(6) by simply providing for judicial review at the behest of the third category of persons listed in Section 502(b)(6)—persons "who could obtain judicial review * * * under applicable [*i.e.*, state] law." The other two categories—"the applicant" and "any person who participated in the public comment process"—would be superfluous, since persons in those categories could obtain judicial review, under petitioner's theory, only if they also fell within the third category. Indeed, under petitioner's theory, Congress could have accomplished the same result by eliminating the references to *all three* categories of individuals in Section 502(b)(6). That would have had the effect of leaving the question of standing to obtain judicial review entirely up to state law—which is exactly the result of the interpretation for which petitioner contends and exactly the result that Congress expressly precluded in Section 502(b)(6).

tation would displace or intrude into some essential core function of state sovereignty."

Petitioner's argument is mistaken. EPA's interpretation of the statute does not "displace or intrude into some essential core function of state sovereignty." To the contrary, EPA's interpretation of the statute *accommodates* concerns of state sovereignty (insofar as they are implicated at all here) by permitting States to deny judicial review to participants in the public comment process who would not satisfy Article III standing requirements. Under the only other plausible reading of Section 502(b)(6), the States would have to go still further in granting standing to *anyone* who participated in the state public comment process. EPA cannot be said to have "displace[d] or intrude[d] into some essential core function of state sovereignty" by relieving States of that burden.[12]

Nor does the fact that Section 502(b)(6) is sufficiently ambiguous in its precise application to warrant deference to EPA's interpretation support petitioner's argument that the statute could support its theory that States may impose whatever standing requirements they wish on those seeking judicial review. There is nothing exceptional in the court of appeals' holding that the meaning of a statutory provision is plain enough to render certain constructions (such as petitioner's) plainly impermissible, while remaining sufficiently ambiguous as to other constructions to make deference to the agency's interpretation appropriate.

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[12] We note that petitioner also asserts in its petition that apart from its contest over the judicial review provision, it has corrected the other four (of the five) deficiencies in its program. Pet. 7 n.4. At the present time, however, EPA has not yet concluded a rulemaking as to the adequacy of those new submissions. Thus, those other four deficiencies alone remain a valid basis for EPA's disapproval of petitioner's permit program. See Pet. App. 9-12.

b. Additional review of the court of appeals' application of *Gregory* is not warranted for another, independent reason. The plain statement rule in *Gregory* was adopted to avoid difficult constitutional problems posed by interpretations of federal statutes that would directly impose mandatory federal requirements that infringe upon a fundamental state sovereign function (*i.e.*, the qualifications of state judges). See, *e.g.*, 501 U.S. at 455, 460. As discussed below, the Title V state permit program provisions, including Section 502(b)(6), do not apply by direct mandate, but rather through a system of incentives. Thus, even if state law control over permit program judicial review provisions were considered to be a fundamental element of state sovereignty, the Clean Air Act structure nonetheless ensures that these Tenth Amendment and related principles of federalism are not transgressed.

2. Petitioner also contends (Pet. 17) that the CAA statutory scheme unconstitutionally "commandeer[s] the legislative process of the States to enact and administer a federal operating permit program." That contention is mistaken.

a. The Tenth Amendment prohibits the federal government from "commandeer[ing] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 161, 188 (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). On the other hand, Congress may "encourage a State to regulate in a particular way," and may "hold out incentives to the States as a method of influencing a State's policy choices." 505 U.S. at 166. That is what Congress has done in Sections 179(b) and 502(d) and (i) of the CAA, 42 U.S.C. 7509(b), 7661a(d) and (i). The offset sanction is a conditional federal regulation, under the Commerce Clause, of private activity over which Congress possesses unquestioned au-

thority. Thus, like the conditional exercise of Commerce Clause authority upheld in *New York*, the offset sanction's burden falls on private parties, not States as sovereigns. 505 U.S. at 174.[13] In such circumstances, "[t]he affected States are not compelled by Congress to regulate." *Ibid.*

Similarly, Congress may attach conditions to a State's receipt of public funds without violating the Tenth Amendment, as Congress has done with the CAA's highway funds sanction.

> By either of these methods [conditional funding or conditional federal preemption], as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply.

New York, 505 U.S. at 168. As the court of appeals correctly stated, "we find no constitutional violation because federal law 'may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority.'" Pet. App. 23 (quoting *FERC* v. *Mississippi*, 456 U.S. 742, 766 (1982)).

b. Petitioner argues (Pet. 16) that the CAA should be read as imposing a direct, enforceable mandate that States

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[13] The two sets of incentives upheld in *New York* establish a number of different inducements to encourage state participation. 505 U.S. at 152-154 (describing the incentives). The second set of incentives upheld in *New York* included federal regulations similar to the CAA offset sanction. They authorized the imposition of increased costs, as well as certain restrictions on private persons, if States do not regulate according to certain federal standards. The Court held that it was constitutional for Congress to exercise its Commerce Clause power by directly regulating private persons on a conditional basis. *Id.* at 173-174.

adopt and submit Title V permit programs to EPA. This Court's decision in *New York*, however, rejected a precisely parallel argument, applying the long-standing rule that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." 505 U.S. at 169-170 (citation omitted).

Petitioners in *New York* argued that the provision in the Low-Level Radioactive Waste Policy Amendments Act that "[e]ach State *shall* be responsible for providing * * * for the disposal of * * * low-level radioactive waste," 42 U.S.C. 2021c(a)(1)(A) (emphasis added), imposed a "direct command" that States "shall" adopt a program for low-level radioactive waste disposal. 505 U.S. at 169. However, because the Act also contained incentive provisions, the Court construed the statute as operating through those incentives rather than as a direct command to regulate. *Id.* at 169-170.

Consistent with *New York*, the court of appeals in this case correctly concluded that the CAA does not impose an independent mandate requiring States to adopt and submit to EPA approvable Title V permit programs, but rather works through the incentives in the Act to induce state cooperation. Pet. App. 25. "Virginia is not commanded to regulate; the Commonwealth may choose to do nothing and let the federal government promulgate and enforce its own permit program within Virginia." *Id.* at 29. Other courts of appeals have uniformly declined to interpret similar use of the term "shall" in the CAA as imposing a direct mandate, and petitioner cites no authority to the contrary.[14]

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[14] "Although the terms 'shall submit' could be construed to impose a mandatory duty upon the states to formulate a plan, judicial construc-

The court of appeals also correctly rejected petitioner's argument (Pet. 6, 20-21) that it will be subject to civil and criminal enforcement under Section 113 of the CAA, 42 U.S.C. 7413, if it fails to comply with the alleged direct mandate to adopt a permit program. See Pet. App. 25 n.6. With respect to Title V, Section 113(a)(2) establishes enforcement authority only to redress "violations of * * * an approved permit program," 42 U.S.C. 7413(a)(2), not authority to compel States to adopt a permit program. Furthermore, Sections 113(a)(3) and (b) authorize enforcement by EPA if certain CAA "requirements" and "prohibitions" are violated. For the same reasons that the CAA should not be interpreted to establish a direct mandate that States adopt approvable permit programs, state adoption of a permit program is not an enforceable "requirement" under Section 113.[15]

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tion of the Act has established that the Act merely gives the States the first opportunity to draft and submit a plan. A state may not be compelled to formulate or submit an implementation plan." *Sierra Club* v. *Indiana-Kentucky Elec. Corp.*, 716 F.2d 1145, 1148 (7th Cir. 1983). See also, *e.g.*, *District of Columbia* v. *Train*, 521 F.2d 971, 983-985 (D.C. Cir. 1975), vacated and remanded for consideration of mootness *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977) (per curiam); *Plan for Arcadia, Inc.* v. *Anita Assocs.*, 379 F. Supp. 311, 314 (C.D. Cal. 1973) ("[T]here is no judicial remedy provided in the Act or elsewhere for the failure of the state to adopt and submit a plan."), aff'd, 501 F.2d 390 (9th Cir.), cert. denied, 419 U.S. 1034 (1974).

[15] Cf. *Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975) (finding that the CAA does not provide EPA the authority to directly compel States to adopt certain CAA programs, and recognizing that Congress may use incentives to attain the same objective), vacated and remanded for consideration of mootness *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977) (per curiam); *District of Columbia* v. *Train*, *supra*; *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975), vacated and remanded for consideration of mootness, 431 U.S. 99 (1977) (per curiam).

3. Petitioner claims (Pet. 23-30) that Congress exceeded its Spending Power authority by increasing limitations on federal highway funds in nonattainment areas when a State fails to submit an approvable Title V permit program. This case does not present any novel question concerning Congress's Spending Power.

a. "Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove* v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.). This Court "has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy." *Ibid.*; see *New York*, 505 U.S. at 167, 171-173; *Massachusetts* v. *United States*, 435 U.S. 444, 461-462 (1978) (opinion of Brennan, J.); *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974); *Oklahoma* v. *United States Civil Service Comm'n*, 330 U.S. 127, 143-144 (1947).

b. Petitioner asserts that the highway fund sanction passes "the point at which 'pressure turns into compulsion.'" Pet. 24, quoting *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). The court of appeals fully considered that issue in light of this Court's decisions and correctly concluded that "[t]he highway sanction here does not rise to the level of 'outright coercion.'" Pet. App. 27.

In *South Dakota* v. *Dole*, 483 U.S. 203 (1987), this Court upheld a restriction on federal highway funding which South Dakota characterized as overly coercive. In so doing, the Court cited previous decisions such as *Fullilove* and *Lau*, in which the Court had upheld exercises of the Spending Power even though Congress had imposed a complete cut-off of substantial federal funding if Congress's requirements were not met. *Id.* at 206. The Court

also noted that previous cases had mentioned that some conditional federal expenditures "might be so coercive as to pass the point at which 'pressure turns into compulsion,'" *id.* at 211 (quoting *Steward Machine*, 301 U.S. at 590). On the other hand, the Court also quoted Justice Cardozo's warning in *Steward Machine*, which noted the difficulty in equating an incentive to compulsion:

> [T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible.

483 U.S. at 211 (quoting 301 U.S. at 589-590).

This case does not test the outer limits of the Spending Power. As the court of appeals recognized, the highway funds sanction does not cut off all federal highway funding, or even require that a State lose any federal highway funds. Pet. App. 27. Rather, Congress provided that, even if a State fails to submit an approvable Title V permit program, federal highway funds may still be used for projects not located in nonattainment areas, and those funds may still be used even in nonattainment areas for safety projects, mass transit, and other projects that will improve air quality and not encourage single occupancy vehicle use. Not only has this Court upheld more significant restrictions in such cases as *Fullilove* and *Lau*, but the courts of appeals have also upheld conditions that exert substantially greater pressure upon States.[16]

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[16] *E.g.*, *Nevada* v. *Skinner*, 884 F.2d 445, 446 (9th Cir. 1989) (withdrawal of virtually all federal highway funds), cert. denied, 493 U.S. 1070 (1990); *City of Columbia* v. *Costle*, 710 F.2d 1009, 1013 n.3 (4th Cir. 1983) (loss of construction grants for sewage treatment plants); *Middlesex County Utilties Auth.* v. *Borough of Sayreville*, 690 F.2d 358 (3d Cir. 1982) (same), cert. denied, 460 U.S. 1023 (1983);

c. The condition that Congress has imposed, adoption of an approvable Title V permit program, also meets this Court's requirement that the condition "bear *some relationship* to the purpose of the federal spending." *New York*, 505 U.S. at 167 (emphasis added); see *id.* at 172 (upholding specific funding condition that was found to be "reasonably related to the purposes of the expenditure"); see also *Missouri* v. *United States*, 918 F. Supp. 1320, 1332-1335 & nn.14-16 (E.D. Mo. 1996) (rejecting constitutional attack on the highway funds sanction as applied to CAA Title I programs), appeal pending, No. 96-2244 (8th Cir.).

Through the highway funds sanction, Congress ensured that, if States fail to implement an approved Title V permit program to help control emissions in their most polluted areas, federal funding for transportation projects in those areas will be restricted to projects that will be consistent with improving air quality.[17] As the court of appeals observed in this case, Congress surely possesses authority

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Oklahoma v. *Schweiker*, 655 F.2d 401 (D.C. Cir. 1981) (withdrawal of medicaid funds); *Walker Field, Colorado, Pub. Airport Auth.* v. *Adams*, 606 F.2d 290, 297 (10th Cir. 1979) (withdrawal of grants for airport construction); *Nebraska* v. *Tiemann*, 510 F.2d 446, 448 (8th Cir. 1975) (withdrawal of an entire category of federal highway funds).

[17] The Third Circuit has also noted the connection between highway construction and the deterioration of air quality. See *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 678 F.2d 470, 478 ("Congress has itself suggested the relationship between a failure to implement programs required by the Clean Air Act and a cut-off of Title 23 funds [as provided] in 42 U.S.C. § 7506(a). Such a cut-off serves both to induce implementation of the [vehicle inspection and maintenance] program and to inhibit highway building, which itself contributes to the problems which the Clean Air Act is designed to remedy."), cert. denied, 459 U.S. 969 (1982); *Pennsylvania* v. *EPA*, 500 F.2d 246, 261 (1974) ("The states have, by their transportation policies, contributed to the problem of air pollution from automobile emissions, and they can be required to take affirmative actions to correct it.").

under the Spending Clause to "ensure that funds it allocates are not used to exacerbate the overall problem of air pollution."[18] Pet. App. 28; see also *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958) ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project *and to the over-all objectives thereof*.") (emphasis added).

Petitioner claims (Pet. 28) that the court of appeals gave insufficient weight to the fact that a Title V permit program regulates stationary sources of air pollution (primarily industrial point sources), while the highway funds sanction aims to reduce pollution from mobile sources (*i.e.*, motor vehicles).[19] However, as the court of appeals recog-

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[18] See, *e.g.*, *South Dakota*, 483 U.S. at 208-209 & n.3 (upholding requirement that States establish 21 as the minimum drinking age in order to receive their full allocation of federal highway funds); *Fullilove*, 448 U.S. at 474-475, 478-480 (opinion of Burger, C.J.) (upholding minority set-asides requirements as a condition on federal public works grants); *Lau*, 414 U.S. at 566-569 (upholding conditions imposed under the Civil Rights Act of 1964 on States that accept federal education funds); *Oklahoma* v. *United States Civil Service Comm'n*, 330 U.S. at 143-144 (upholding Hatch Act requirement that States restrict the political activities of state officials who oversee expenditures of federal grants). See also *Oklahoma* v. *Schweiker*, 655 F.2d at 406-407 (restrictions on federal grants have never been subject to a "rigid nexus" test requiring that those conditions be "precisely related to the purpose of the federal funds whose receipt is conditioned") (discussing cases).

[19] Petitioner also asserts (Pet. 29) that the highway funds sanction is irrational because federal highway funds can be used only for projects that have been shown to be in conformity with an applicable SIP, as required by 42 U.S.C. 7506(c). The court of appeals did not discuss that argument because petitioner failed to present it below. In any event, petitioner is mistaken regarding the effect of a conformity determination.

The CAA conformity provision requires that all federally supported transportation projects be part of a transportation plan and transporta-

nized, "[t]he CAA as a whole is a comprehensive scheme to cope with the problem of air pollution from all sources." Pet. App. 28. Mobile sources and stationary sources both contribute significantly to the overall air pollution problem; in fact, both produce many of the same regulated air pollutants.[20]

4. Petitioner argues (Pet. 19-22) that the economic impact of the highway funds sanction, a conditional exercise of the Spending Power, in combination with the economic impact of the offset sanction, a conditional exercise of the Commerce Power, results in a violation of the Tenth Amendment. That argument is mistaken.

a. Under *New York*, the Tenth Amendment is not violated merely because Congress uses several entirely constitutional sources of authority to induce States to act, even if the combination of the various sources of authority

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tion improvement program which are in conformity with the applicable SIP. 42 U.S.C. 7506(c); see generally *Environmental Defense Fund, Inc.* v. *EPA*, 82 F.3d 451, amended, 92 F.3d 1209 (D.C. Cir. 1996). The approval of a project under the conformity process is not, however, a blanket environmental endorsement of a project, but simply a deterination that, under the particular set of conditions assumed in the control strategy, the project may proceed with federal funding. The success of any control strategy necessarily depends not just upon the conformity status of particular transportation projects but upon the State's adoption and implementation of *all* the measures needed to adequately control emissions of the relevant pollutants, including an effective Title V permit program.

[20] With respect to ozone, for example, "[t]he two major sources of the ozone precursors * * * are motor vehicles and industry." H.R. Rep. No. 490, 101st Cong., 2d Sess. 202 (1990). Similarly, "[p]articulate matter originates from stationary and mobile sources, both natural and man-made." *Natural Resources Defense Council, Inc.* v. *EPA*, 902 F.2d 962, 965 (1990), vacated in part on other grounds, 921 F.2d 326 (D.C. Cir. 1991), cert. dismissed, 498 U.S. 1075, cert. denied, 498 U.S. 1082 (1991).

would have an economic impact on the State. 505 U.S. at 171-174. Rather, the Tenth Amendment issue turns on whether Congress has "commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 161, 188 (quoting *Hodel*, 452 U.S. at 288).[21]

Petitioner's argument is also inconsistent with *Hodel*, in which the Court concluded that the economic impact of a federal regulatory program on Virginia's economy is insufficient to establish a violation of the Tenth Amendment. 452 U.S. at 292 n.33. Rather, the controlling factor is "the nature of the federal action, not the ultimate economic impact on the States." *Ibid.* See also *FERC* v. *Mississippi*, 456 U.S. 742, 766 (1982) (Congress does not exceed its authority because the choice it presents to a State "may be a difficult one").

The economic impact of the offset sanction is likewise unrelated to the inquiry in *Dole* regarding whether an exercise of Congress's Spending Power would "pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (citation omitted). In contrast to the highway funds sanction, the offset sanction directly regulates private parties under the Commerce Clause. As explained in *New York*, under such direct regulation

> [t]he affected States are not compelled by Congress to regulate, because any burden caused by a State's

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[21] In *New York*, the Court noted that the two constitutional incentives--a funding incentive parallel to the highway funding incentive in this case, see 505 U.S. at 171-172, and the imposition of substantive federal regulations parallel to the CAA offset sanction, see *id.* at 173-174—applied "considerable internal pressure" to States and "coax[ed]" the States into regulating in the manner Congress desired. *Id.* at 187. The Court nonetheless found no constitutional flaw in the two sets of incentives invoked by Congress or in their combined effect. *Id.* at 171-174.

> refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign.

505 U.S. at 174. Accordingly, the court of appeals correctly concluded that "[t]he burden of the offset sanction falls on private parties. * * * [I]t does not burden Virginia as a *governmental* unit." Pet. App. 28. Therefore, the simultaneous application of the offset sanction and highway funds sanction would not result in a constitutional violation.

b. Petitioner argues (Pet. 21-22) that the highway funds and offset sanctions are unnecessary once EPA promulgates a federal Title V program for Virginia, and that the fact that those sanctions would nonetheless remain in effect establishes that the scheme is unduly coercive in violation of the Tenth Amendment.

Petitioner's argument is mistaken. The federal sanctions at issue here leave petitioner with the option of refusing to enact a scheme that complies with Title V's requirements. They therefore do not implicate *New York*'s anti-commandeering principle, regardless of whether they are considered singly or together. See Pet. App. 29-30. Moreover, the need for incentives for state cooperation continues well after promulgation of a federal Title V program. As the court of appeals recognized (Pet. App. 5 (quoting applicable legislative history)), Congress believed that the nationwide CAA program works best, and the goals of the CAA are best achieved, when EPA serves in an oversight role and the States, with their greater familiarity with local problems and conditions, adopt and implement the various programs. Thus, as long as a State chooses not to adopt an approvable Title V permit program, the rationale for the sanctions—to encourage state

cooperation and therefore to ensure the effectiveness of the CAA program—remains.[22]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[22] In addition, the court of appeals recognized that the sanctions reduce air pollution by requiring greater offsets for certain stationary sources and reducing emissions from mobile pollution sources. Pet. App. 28. Because the sanctions affect only areas within the State that are out of attainment with the NAAQS, they continue to serve the statutory purpose of achieving attainment even after adoption of a federal Title V permit program.